

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN JAMES ESTEP,

Defendant-Appellant.

UNPUBLISHED

August 2, 2005

No. 253125

Crawford Circuit Court

LC No. 02-002015-FC

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a),¹ and was sentenced to six to twenty years in prison. He appeals as of right. We affirm.

Defendant's conviction arises from his act of digitally penetrating the vagina of the five-year-old victim, who had been attending a daycare program run by his wife out of their home in Grayling.

On appeal, defendant contends that the trial court erred in allowing the victim to testify regarding a photograph taken at the time of his arrest. First, he argues that the testimony did not properly identify him as the perpetrator. Although the victim identified the person depicted as "Kevin," she had earlier testified that she knew two men with this name. She never stated that the Kevin pictured was the one who had sexually abused her. Second, even if the identification of the photograph was enough to serve as an identification of defendant, the procedure used was unduly suggestive and denied defendant a fair trial.

In essence, defendant argues that the trial court erred in admitting the evidence. We review a trial court's decision to admit evidence for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

¹ Penetration of person under thirteen years of age.

Defendant's first argument, that the victim's testimony was inadmissible because it failed to expressly identify him, is without merit. Under MRE 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court." And evidence is relevant if it has "*any* tendency" to make a fact at issue more or less probable. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212; 539 NW2d 504 (1995) (emphasis in original). Although the victim stated that she knew two men named Kevin, her testimony naming "Kevin" as the person who touched her and identifying defendant's photograph as "Kevin" tended to establish that defendant was the perpetrator. Defendant cites no authority in support of his argument that this relevant evidence should be excluded. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Consequently, we decline to further consider the argument.

Defendant's argument that the use of a single photograph constituted an unduly suggestive means of identifying him must also fail. As defendant contends, a photographic identification procedure, including the display of even a single improper photograph, can be so suggestive as to deprive the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). But the authority cited by defendant deals with whether a pretrial identification procedure was unduly suggestive and therefore might require the suppression of a victim's subsequent in-court identification of the accused. For example, in *Gray*, a police officer showed a rape victim a single photograph of the defendant and indicated that he had been arrested in connection with the assault. *Id.* at 110. The Court noted that the danger of this procedure was that "once the identify of the victim's assailant was suggested to her through the photographic identification procedure, she may be likely to base later identifications of the suspect upon that photograph, rather than on [her] recollection of the crime." *Id.* at 112.

In the instant case, defendant does not argue that suggestive pretrial identification procedures were employed. Rather, he contends that allowing the victim to testify regarding the photograph take at the time of his arrest similarly violated his rights. Although the victim could not identify defendant in person at trial (apparently because he had grown a mustache and was wearing a suit instead of his usual attire), she did so at the preliminary examination three months earlier. Unlike scenarios such as the one presented in *Gray*, the use of the single picture at trial did not create a danger that the victim would subsequently misidentify defendant. And rather than presenting the photograph in a suggestive manner, the prosecution merely asked if the victim could identify the person depicted. Further, when admitting the testimony, the trial court noted that defendant's appearance had changed markedly since the time of his arrest. Based on these circumstances, an unprejudiced person could not say the trial court's decision was without justification. Consequently, we find that the court did not abuse its discretion in admitting the victim's testimony regarding the photograph.

Defendant next contends that the prosecution failed to present sufficient evidence to sustain his conviction. We review de novo a challenge to a conviction based on the sufficiency of the evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the

sufficiency of the evidence, we must examine the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997)

Under MCL 750.520b(1)(a), a person is guilty of CSC-I if the person engages in sexual penetration with another person and the victim is under the age of thirteen. *People v Hack*, 219 Mich App 299, 303; 556 NW2d 187 (1996). MCL 750.520a(o) defines sexual penetration as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.”

In the instant case, sufficient evidence of sexual penetration existed in that the victim testified that defendant “put his finger in my butt.” Although the victim failed to point out defendant in court, she identified him as “Kevin” and stated that he was the husband of her daycare provider. As noted above, when shown a picture of defendant taken at the time of his arrest, she identified the person depicted as Kevin. Further, State Trooper Robert Suchowesky testified that when questioned, defendant admitted that he inserted his finger into the victim’s vagina on one occasion. This testimony is sufficient to establish that defendant engaged in sexual penetration with the victim. Moreover, it is undisputed that the victim is under age thirteen. Viewed in the light most favorable to the prosecution, a rational jury could have found that the prosecution proved all elements of CSC-I beyond a reasonable doubt. We therefore affirm defendant’s conviction.

Affirmed.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly